Supreme Court, U.S.
FILED

97 • 302 AUG 1 1 1997

No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1996

CAROLYN ARMOR; RICHARD T. ARMOR, JR.,

Petitioners,

v.

MICHELIN TIRE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Dennis L. Sipe
Counsel of Record
BUELL & SIPE COMPANY, L.P.A.
322 Third Street
Marietta, Ohio 45750
(614) 373-3219

Counsel for Petitioners

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

62 pp

QUESTIONS PRESENTED

FOR A PARTY TO BE ENTITLED TO RELIEF FROM JUDGMENT PURSUANT TO FED R. CIV. P. 55(C) THE PARTY MUST DEMONSTRATE THAT BOTH THE PARTY AND ITS COUNSEL WAS NOT AT FAULT AND THAT THE PARTY HAS A MERITORIOUS DEFENSE

THE WEST VIRGINIA SAVINGS CLAUSE, AS INTERPRETED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS IS TO BE LIBERALLY INTERPRETED AND IS APPLICABLE TO LITIGATION WHICH HAD BEEN PREVIOUSLY DISMISSED BECAUSE THE INJURED PARTY WAS NOT READY TO PROCEED ON THE DAY OF TRIAL

LIST OF PARTIES

Petitioners are Carolyn and Richard Armor.

Respondents are Michelin Tire Corporation and John Doe, a yet unidentified Defendant, at the time of the filing of Petitioners' complaint in the Federal District Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RELEVANT OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 10

I. A TRIAL COURT CANNOT GRANT RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 55 UNLESS THE DEFAULTING PARTY HAS MET ITS BURDEN AS TO ALL OF THE PRE-REQUISITES. 11

A. RELIEF FROM DEFAULT PURSUANT TO FED. R. CIV. P. 55(C) IS NOT AVAILABLE IF THE DEFAULT WAS THE RESULT OF THE NEGLIGENCE OF COUNSEL FOR THE DEFAULTING PARTY 11

B. RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 55(C) IS PRECLUDED UNLESS THE PARTY IN DEFAULT CAN AFFIRMATIVELY PROVE IN ITS MOTION FOR RELIEF THAT IT HAS A MERITORIOUS DEFENSE AS TO THE CAUSES OF ACTION CONTAINED IN THE COMPLAINT 13

II. THE WEST VIRGINIA SAVINGS STATUTE, AS INTERPRETED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS, PRECLUDED DISMISSAL OF PETITIONERS' COMPLAINT 15

CONCLUSION 20

APPENDIX ..... App. i

TABLE OF AUTHORITIES

CASE — Page No.

Armor, et al. vs. Michelin Tire Corporation, et al.,
No. 96-1724 (4th Cir., May 13, 1997) 1

August Fiberglass Coatings Inc. vs.
Fodor Contracting Corp.,
843 F.2d 808 (4th Cir. 1988) 14

Bent vs. Read,
97 S.E. 286 (W.Va. 1918) 18

Central Operating Co. vs.
Utility Workers of America, AFL-CIO,
491 F.2d 245 (4th Cir. 1974) 11, 13

C. J. C. Holdings Inc. vs. Wright & Lato, Inc.,
979 F.2d 60 (5th Cir. 1992) 12

Consolidated Masonry & Fireproofing Inc. vs.
Wagman Const. Corp.,
383 F.2d 249 (4th Cir. 1967) 14

Coon vs. Grenier,
867 F.2d 73 (1st Cir. 1989) 14

Crawford vs. Hatcher,
804 F.Supp. 834 (D.C.W.Va. 1992) 18

Employees Fire Ins. Co. vs. Biser,
242 S.E.2d 708 (1978 18

Farnese vs. Bagnasco,
687 F.2d 761 (3rd Cir. 1982).....14

Fidelity Trust Co. vs. Field,
311 U.S. 169 (1940) 15, 17

Gomes vs. Williams,
420 F.2d 1364 (10th Cir. 1970).....14

Hawaii Carpenters' Trust Funds vs. Stone,
794 F.2d 508 (9th Cir. 1986).....14

Henthorn vs. Collins,
118 S.E.2d 358 (W.Va. 1961) 17

Hevener vs. Hannah,
53 S.E. 635 (W.Va. 1906) 18

Invst. Financial Group Inc. vs.
Chem-Nuclear Systems, Inc.,
815 F.2d 391 (6th Cir. 1987).....14

Lawrence vs. Winifrede Coal Co.,
35 S.E. 925 (W.Va. 1900) 18

Link vs. Wabash Railroad Co.,
370 U.S. 626 (1942) 13

Litten vs. Peer,
197 S.E. 322 (W.Va. 1973) 16, 17

Lolatchy vs. Arthur Murray Inc.,
816 F.2d 951 (4th Cir. 1987).....13

Marziliano vs. Heckler,
728 F.2d 151 (2nd Cir. 1984) 14

McClung vs. Tieche,
29 S.E.2d 250 (W.Va. 1944) 17, 18

Mercer vs. Snider, Raitt and Hever,
730 F.Supp. 74 (W.D. Mich. 1980) 14, 17

Moldwood Corp. vs. Stutts,
410 F.2d 351 (5th Cir. 1969) 14

North Cent. Illinois Laborers' Dist. Council vs. S. J. Groves & Sons Co., Inc.,
842 F.2d 164 (7th Cir. 1988) 12

Ryan vs. Piney Coal & Coke Co.,
73 S.E. 330 (W.Va. 1912) 18

Six Companies of California vs. Joint Highway Dist.,
311 U.S. 180 (1940) 15, 17

Sony Corp. vs. Elm State Electronics, Inc.,
800 F.2d 317 (2nd Cir. 1986) 13, 14

Tompkins vs. Pacific Mutual Life Ins. Co.,
44 S.E. 439 (W.Va. 1903) 18

United States vs. Di Mucci,
879 F.2d 1488 (7th Cir. 1989) 13

United States vs. Moradi,
673 F.2d 725 (4th Cir. 1982) 11, 13

West vs. AT & T Co.,
311 U.S. 223 (1940) 15

Zuelzke Tool & Engineering Co., Inc. vs. Anderson Die Castings Inc.,
925 F.2d 226 (7th Cir. 1991) 12

RULES

Fed. R. Civ. P. 41(B) 16

Fed. R. Civ. P. 55(C) 5, 10, 11, 12, 13

Ohio R. Civ. P. 41(a) 16

Ohio R. Civ. P. 41(a)(2) 3, 6

STATUTES

Ohio Revised Code Section 2305.19 ..... 2, 16

West Virginia Code Section 55-2-18 ..... 1, 16

CODES

28 U.S.C. 1254 (1) 1

RELEVANT OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, *Armor, et al. vs. Michelin Tire Corporation, et al.*, No. 96-1724 (4th Cir., May 13, 1997) is unreported (App. 7). The order of the United States District Court, Southern Division, granting Michelin's Motion for Summary Judgment on April 23, 1996, is unreported. *Armors, et al. vs. Michelin Tire Corp., et al.*, No. 6:95-0779 (S.D.W.Va. 1996) (Memorandum Opinion and Order granting Michelin's December 1, 1995 Motion for Summary Judgment) (App. 13). The order of the District Court denying Petitioners' Motion for Default Judgment on December 21, 1995, is unreported. *Armor, et al. vs. Michelin Tire Corp., et al.*, No. 6:95-0779 (S.D.W.Va. 1995). (Order denying Petitioners' May 1, 1995 Motion for Default Judgment)

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on May 13, 1997 (App. 1). The Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS AND RULES

This case involves the following statutory provisions.

Section 55-2-18 of the West Virginia Code provides in full:

> If any action or suit, including an action for wrongful death, commenced within due time, in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her

death or marriage, or if, in an action or suit, including an action for wrongful death, commenced within due time, judgment or decree (or other and further proceedings) for the plaintiffs should be arrested or reversed on a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action or suit by reason of such cause having been dismissed for want of security for costs, or by reason of any other cause which, could not be plead in bar of an action or suit, or of the loss or destruction of any of the papers or records in a former action or suit which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal or other cause, or after such arrest or reversal of judgment or decree, or such loss or destruction, but not after. The provisions of this section shall not apply to actions brought for the death of any person occurring prior to the first day of July, one thousand nine hundred eighty-two. (Code 1849, c. 149 §18: Code 1860, c. 149, § 18; Code 1868, c. 104, § 19; 1872-3, c. 112, § 19; 1882. c. 102. § 19; Code 1923, c. 104, § 19; 1985 c.1.)

Ohio Revised Code Section 2305.19 provides in full:

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action

at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. If the defendant is a corporation, foreign or domestic, and whether its charter prescribes the manner and place, or either, of service of process thereon, and it passes into the hands of a receiver before the expiration of such year, then service to be made within the year following such original service or attempt to begin the action may be made upon such receiver or his cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of such agents or officers of the receiver with the person having charge thereof. If such corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no such agent, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on such defendant.

Additionally, Rule 41 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff, By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of

court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal

otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 55 of the Federal Rules of Civil Procedure provides in part:

> **(a) Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

> (1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant. If the defendant has been defaulted for failure to appear and is not an infant or incompetent person.
>
> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee,

conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 41 of the Ohio Rules of Civil Procedure provides in pertinent part:

Dismissal of actions
(A) Voluntary dismissal: effect thereof

(1) *By plaintiff; by stipulation.* Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of

dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

(2) *By order of court.* Except as provided in subsection (1) an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATEMENT OF THE CASE

On June 3, 1991, Petitioner Carolyn Armor was driving a motor vehicle in Wood County, West Virginia.

Suddenly and without warning, the tire on the right rear of her motor vehicle wrapped around the rear axle. Whereupon the motor vehicle left the roadway, landed on its top, and caused serious injuries to Carolyn Armor. The tire in question was manufactured and inspected by Michelin Tire Corporation.

On June 3, 1993, the Armors filed suit against Michelin Tire Corporation in the Circuit Court of Wood County, West Virginia.

On June 2, 1993, the Armors instituted suit against Michelin Tire Corporation in the Washington County, Ohio, Common Pleas Court.

On June 24, 1994, the West Virginia lawsuit was dismissed due to failure of service. In actuality, counsel for the parties (including Michelin Tire Corporation) determined that the Washington County, Ohio, Common Pleas Court would be a more convenient forum.

In September 1994, it became apparent to counsel for the Armors that the Armors would not be prepared for trial which was scheduled for September 24, 1994. Plaintiffs had retained an expert who needed additional time and information to complete his investigation concerning the defective tire. In addition, the injuries that Carolyn Armor sustained as a result of the automobile accident began to increase in severity. Consequently, the Armors were no longer able to reasonably predict the future extent of Carolyn Armor's injuries.

On September 19, 1995, the Washington County, Ohio Common Pleas Court dismissed without prejudice the Ohio lawsuit with the proviso that "The Plaintiffs maintain the right to refile the within action within one year of the filing of the entry."

On September 15, 1995, the Armors reinstituted litigation in the United States District Court, Southern District of West Virginia.

Upon the filing of the lawsuit, counsel for the Armors provided counsel for Michelin Tire Corporation with a courtesy copy of the complaint.

On October 18, 1995, the District Court approved a stipulation that Michelin Tire Corporation would have until November 5, 1995, in which to answer the complaint. The stipulation which was prepared by counsel for Michelin Tire Corporation stated "notice by the clerk being waived".

On October 20, 1995, the District Court established certain dates with respect to the instant litigation. The docket reflects the Clerk served counsel for Michelin Tire Corporation with a copy of the order.

On November 21, 1995, the District Court Clerk provided counsel for both parties with Notice that Michelin Tire Corporation had not answered the complaint. On December 1, 1995, the Armors (Petitioners) moved for a default judgment.

On December 1, 1995, Michelin Tire Corporation (Respondent) moved for leave to file an untimely answer to Petitioners' complaint. In its motion, Michelin Tire Corporation documented only the reasons that counsel was untimely in answering the complaint and not the meritorious defenses it had as to the matters contained in the complaint. With the motion, Michelin Tire Corporation tendered a copy of its Answer which consisted only of general denials and the listing of fifteen affirmative defenses.

On December 21, 1995, the District Court denied the Armors' Motion for a Default Judgment and granted Michelin Tire Corporation leave to file its untimely answer. (App. 12).

On January 25, 1996, Michelin Tire Corporation filed a Motion for Summary Judgment.

On February 23, 1996, the Armors filed their Memorandum in Opposition to the Michelin Tire Corporation's Motion for Summary Judgment.

On April 23, 1996, the District Court granted the Michelin Tire Corporation's Motion for Summary Judgment. (App. 13).

On May 13, 1997, the United States Court of Appeals affirmed the judgments of the District Court with respect to the denial of Petitioners' Motion for Default Judgment and the granting of Michelin's Motion for Summary Judgment. (App. 1).

REASONS FOR GRANTING THE WRIT

The decision below contains two exceedingly important interpretations of Fed. R. Civ. P. 55, each inconsistent with prior decisions of other courts and each with far reaching consequences beyond the instant litigation. Both the District Court and Circuit Court refused to impute the negligence of the attorneys for Michelin Tire Corporation to Michelin Tire Corporation. Counsel for Michelin received a copy of Petitioners' complaint and subsequently entered into a stipulated scheduling order. Counsel for Michelin did not file a timely answer pursuant to the stipulated scheduling order. This negligence of counsel was not imputed to Michelin when the District Court and the Court of Appeals decided the default judgment issue. In addition, when Michelin Tire Corporation asked for relief from its default it did not make a particularized showing as to any defense it had as to Petitioners' complaint. The relaxation of standards warranting relief from judgment, as occurred in the instant proceedings, will have a grave impact upon the finality of judgments and any incentives parties have to comply with the time limitations established by the Federal Rules of Civil Procedure.

The second reason for Granting the Writ is the Court of Appeals interpretation of the West Virginia Savings Statute. The Court ignored clear authority that the Savings Statute was applicable. The case presents the court with the opportunity to

insure that two methods for terminating litigation prior to trial, the provisions involving default judgment, and statute of limitations are read and applied in the same spirit. The courts below read the Default Judgment Rules to preserve a party's right to "have his day in court", but read the Savings Statute very strictly to deprive a party of "his day in court". A plaintiff's right and defendant's right to have their disputes settled by the trier of fact should be treated equally.

I. A TRIAL COURT CANNOT GRANT RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 55 UNLESS THE DEFAULTING PARTY HAS MET ITS BURDEN AS TO ALL OF THE PREREQUISITES.

A. RELIEF FROM DEFAULT PURSUANT TO FED. R. CIV. P. 55(C) IS NOT AVAILABLE IF THE DEFAULT WAS THE RESULT OF THE NEGLIGENCE OF COUNSEL FOR THE DEFAULTING PARTY

A party must show as a precondition to gaining relief from a default entry that the party had an acceptable excuse for lapsing into default. *Central Operating Co. vs. Utility Worker of America, A.F.L. C.I.O.*, 491 F.2d 245, 252 (4th Cir. 1974); *United States vs. Moradi*, 673 F.2d 725, 727 (4th Cir. 1982).

It is uncontroverted in the present case that counsel for Michelin Tire Corporation received a courtesy copy of the complaint from the Petitioners' counsel. The parties entered into a stipulation that Michelin Tire Corporation was to answer the complaint by November 5, 1995. This stipulation was drafted by counsel for Michelin Tire Corporation. On the last line of the stipulation, counsel for Michelin Tire Corporation

drafted the following phrase "notice by the clerk being hereby waived". Two days after the stipulation was approved by the District Court, the Court entered an order and notice setting forth certain deadlines pursuant to the Court's rules. The trial court docket reflects that the order was sent to all counsel.

It is professionally unreasonable for an attorney to believe that he could make an appearance in a case and not be bound by the orders subsequently entered in that case. *North Cent. Illinois Laborer's Dist. Council vs. S. J. Groves & Sons Co., Inc.*, 842 F.2d 164 (7th Cir. 1988); *Zuelzke Tool & Engineering Co., Inc. vs. Anderson Die Castings Inc.*, 925 F.2d 226 (7th Cir. 1991).

In *CJC Holdings Inc. vs. Wright & Lato, Inc.*, 979 F.2d 60 (5th Cir. 1992), the Court of Appeals for the Fifth Circuit discussed the impact that the receipt of a courtesy copy of the complaint had upon Defendant's motion for relief filed pursuant to Fed. R.C.V.P. 55(C). In *CJC Holdings Inc.*, the Plaintiff provided defense counsel with a courtesy copy of the complaint. The Circuit Court concluded that this copy was sufficient to place the Defendant "on notice it would soon be served with process". Id. at 64. That notice precluded any claim that the Defendant had good cause to set aside the judgment.

The Defendant in the present case was certainly placed upon notice that it had been sued. The fact that counsel for the Defendant received a courtesy copy of the complaint, and subsequently entered into a written stipulation thereby making an appearance upon behalf of the Defendant demonstrates the carelessness of counsel for the Defendant. This carelessness ultimately caused the default entry to be placed of record.

A default entry will only have deterrent effect to force parties to meet court imposed deadlines if default judgments are in fact enforced. *North Cent. Illinois Laborer's Dist. Council vs. S. J. Groves & Sons Co., Inc., supra*, at 167. Default judgments are a useful weapon for enforcing

compliance with the Rules of Procedure. *Sony Corp. vs. Elm State Electronics, Inc.*, 800 F.2d 317, 320 (2nd Cir. 1986).

Compliance with the Rules of Procedure will only be gained if the errors of counsel in failing to comply with the applicable rules are imputed to the client. *United States vs. Di Mucci*, 879 F.2d 1488, 1495 (7th Cir. 1989), *Lolatchy vs. Arthur Murray, Inc.*, 816 F.2d 451, 454-956 (4th Cir. 1987) (Wilkinson dissenting). Notice to a party's attorney constitutes notice to the party. *Link vs. Wabash Railroad*, 370 U.S. 626, 633-634 (1962).

The Court of Appeals improperly concluded that the negligence of counsel for Michelin Tire should not be imputed to Michelin Tire Corporation and that the negligence should not preclude Michelin from obtaining relief from judgment pursuant to Fed. R. Civ. P. 55(C).

B. RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 55(C) IS PRECLUDED UNLESS THE PARTY IN DEFAULT CAN AFFIRMATIVELY PROVE IN ITS MOTION FOR RELIEF THAT IT HAS A MERITORIOUS DEFENSE AS TO THE CAUSES OF ACTION CONTAINED IN THE COMPLAINT

Prior to a trial court vacating a default entry, the defaulting party must prove that it has a meritorious defense. *Central Operating Co. vs. Utility Workers of America, AFL CIO*, 491 F.2d 245, 252 (4th Cir. 1974), *United States vs. Moradi*, 673 F.2d 725, 727 (4th Cir. 1982). To permit reopening of a case in the absence of a meritorious defense would cause needless delays to the parties and the court

system. *Hawaii Carpenters' Trust Funds vs. Stone*, 794 F.2d 508, 513 (9th Cir. 1986).

It is not sufficient that the defaulting party alleges in conclusionary fashion that it has a meritorious defense. *Consolidated Masonry & Fireproofing Inc. vs. Wagman Const. Corp.*, 383 F.2d 24, 251-252 (4th Cir. 1967). The party moving to vacate the default must support its general denials with underlying facts. *Sony Corp. vs. Elm State Electronics Inc.*, 800 F.2d 317, 320-321 (2nd Cir. 1986). The test to be employed is whether the defaulting party demonstrates that there is some possibility that the outcome will be contrary to the result achieved by the default. *August Fiberglass Coatings Inc. vs. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988); *INVST Financial Group Inc. vs. Chem-Nuclear Systems Inc.*, 815 F.2d 391, 399 (6th Cir. 1987).

The cases in which the defaulting party has met the burden of proof, the party has often set forth the necessary facts in affidavits. *Coon vs. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989); *Farnese vs. Bagnasco*, 687 F.2d 761, 764 (3rd Cir. 1982). The courts have repeatedly rejected motions to vacate which did not identify meritorious defenses, *Moldwood Corp. vs. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969); motions which promised to reveal meritorious defenses at some future date; *Mercer vs. Snider, Raitt, and Hever*, 730 F.Supp. 74, 79 (W.D. Mich. 1990); *United States vs. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316 (5th Cir. 1984), or motions which did not contain sufficient facts in support of the identified defenses, *Gomes vs. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Marzialano vs. Heckler*, 728 F.2d 151, 154, 156 (2nd Cir. 1984).

In the present case, Petitioners had previously instituted suit against Michelin Tire Corporation in the Washington County, Ohio Common Pleas Court and both parties had engaged in extensive discovery. Thus Michelin Tire Corporation, because it had already conducted discovery with respect to the allegations contained in the complaint, was

in a position to identify, with detail, its defenses to the Armors' complaint. However, the affidavit submitted by Michelin Tire Corporation in support of the Motion to Untimely File its Answer dealt entirely with the reasons that the default had occurred and did not identify any potentially meritorious defenses.

In conjunction with its Memorandum in Opposition to the Plaintiffs' Motion for Default Judgment, the Defendant tendered its answer, but the answer set forth general denials and fifteen possible affirmative defenses. The "most detail" that the Defendant provided as to its defenses was "Michelin had its expert examine the tire in question. There is a serious dispute over whether or not the tire was defective". Again, this is a mere unsupported conclusion. At a minimum, Michelin Tire Corporation should have submitted an affidavit from its expert to be entitled to relief.

The courts below erred when they determined that Michelin was entitled to relief from judgment, despite the fact that it had not set forth, with any particularity, the meritorious defenses it had as to the claims contained within Petitioners' complaint.

II. THE WEST VIRGINIA SAVINGS STATUTE, AS INTERPRETED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS, PRECLUDED DISMISSAL OF PETITIONERS' COMPLAINT

The federal courts are bound by prior state court precedent interpreting state law, regardless of whether the federal courts accept the interpretation as valid or wise. *Fidelity Trust Co. vs. Field*, 311 U.S. 169 (1940); *Six Companies of California vs. Joint Highway Dist.*, 311 U.S. 180, 188 (1940); *West vs. AT & T Co.*, 311 U.S. 223, 236 (1940).

In the present case the Fourth Circuit Court of Appeals failed to properly apply a decision of the West Virginia Supreme Court of Appeals, which was directly on point as to the applicability of the West Virginia Savings Statute. The Fourth Circuit Court's improper interpretation led to its conclusion that the District Court had properly granted Summary Judgment in favor of Michelin.

Prior to the instant action, Carolyn and Richard Armor filed suit against Michelin Tire Corporation in the Washington County, Ohio Common Pleas Court. Five days prior to trial, on September 19, 1994, the Ohio court dismissed the litigation because the Armors were not prepared to proceed at trial. The trial court dismissed the litigation pursuant to Ohio R. Civ. P. 41(A), without prejudice. The dismissal entry of the Ohio trial court specifically stated that the lawsuit was subject to refiling within one year of the dismissal. See also Ohio Revised Code Section 2305.19.

The Armors instituted their litigation in the Federal District Court of the Southern District of West Virginia within a period of one year from the dismissal by the Ohio court. The District Court granted summary judgment in favor of Michelin after the court determined that the instant litigation was barred by the West Virginia Statute of Limitations and that the West Virginia Savings Statute was not applicable to the instant proceedings despite the fact that Petitioners filed their suit within one year of the Ohio dismissal. Section 55-2-18 of the West Virginia Code clearly provides for a one year "grace period"; Ohio Revised Code Section 2305.19.

In *Litten vs. Peer*, 197 S.E. 2d 322 (W.Va. 1973), the West Virginia Supreme Court of Appeals decided a case with almost identical facts to the present case. In *Litten*, the plaintiff failed to appear on the date that his lawsuit was set for trial. The Federal District Court dismissed the plaintiff's suit with prejudice pursuant to Fed. R. Civ. P. 41(B). The plaintiff refiled his litigation in the State Courts of West Virginia within one year of the dismissal by the Federal Court. The

West Virginia trial court dismissed the litigation and the plaintiffs appealed. The West Virginia Supreme Court of Appeals in *Litten* initially concluded that the Savings Statute was not dispositive of the issue. Instead, the Supreme Court of Appeals focused upon whether the Federal Court's dismissal with prejudice was binding upon the state courts pursuant to the doctrine of res judicata. Id at 326. The Court determined that because the dismissal was with prejudice, pursuant to the federal rule, the action could not be refiled in the state courts of West Virginia, even though refiling would have been permitted by the West Virginia Savings Statute. The Court concluded that the doctrine of res judicata required that the West Virginia courts could not permit the refiling of litigation because the prior forum (Federal District Court) held that the litigation could not be refiled.

The courts below should have decided the refiling issue in the instant case by reference to the legal doctrines of the law of the case and res judicata, that the West Virginia Supreme Court of Appeals identified in *Litten vs. Peer, supra.* Instead, the District Court specifically determined that the doctrine of res judicata was not dispositive of the issue of the propriety of the refiling of the litigation. Whether the Federal District Court agreed with the analysis of the West Virginia Supreme Court of Appeals. The District Court was bound by this analysis. *Fidelity Trust Co. vs. Field, supra*; *Six Companies of California vs. Joint Highway Dist., supra.*

If the courts below had properly applied *Litten*, they would have also have followed the spirit of the West Virginia Savings Statute as determined by numerous cases decided by the West Virginia courts. Those courts have always held the statute should be liberally interpreted. *McClung vs. Tieche*, 29 S.E. 2d 250, 252 (W.Va. 1944), *Henthorn vs. Collins*, 118 S.E. 2d 358, 360 (W.Va. 1961). A liberal interpretation of the statute advances the purpose of remedial character of the statute. Id.

The statute has traditionally been given a broader scope than similar statutes in other states. *Tompkins vs. Pacific Mutual Life Ins. Co.*, 44 S.E. 439, 441 (W.Va. 1903); *Bent vs. Read*, 97 S.E. 286, 288 (W.Va. 1918).

The West Virginia courts have concluded that only if the statute is liberally applied will the statute accomplish its goals, to give extended time for another suit in any case when the first suit involving the same cause of action was not successful for any reason which is not a bar to another suit. *Hevener vs. Hannah*, 53 S.E. 635, 636 (W.Va. 1906). The Savings Statute is designed to remedy the harsh effect of the statute of limitations and to save a cause of action which would otherwise be barred. *McClung vs. Tieche, supra*; *Employees Fire Ins. Co. vs. Biser*, 242 S.E. 2d 708, 711 (W.Va. 1978).

The West Virginia courts when determining if the Savings Statute is applicable, have adopted an equitable analysis. The courts have attempted to ascertain if the party reinstituting the suit has met the "spirit and purpose of the statute" as opposed to just the mere "letter" of the statute. *Lawrence vs. Winifrede Coal Co.*, 35 S.E. 925, 926 (W.Va. 1900); *Ryan vs. Piney Coal & Coke Co.*, 73 S.E. 330, 331 (W.Va. 1912). The applicability of the Savings Statute depends "largely upon the good faith and diligence of the party invoking it". Id.

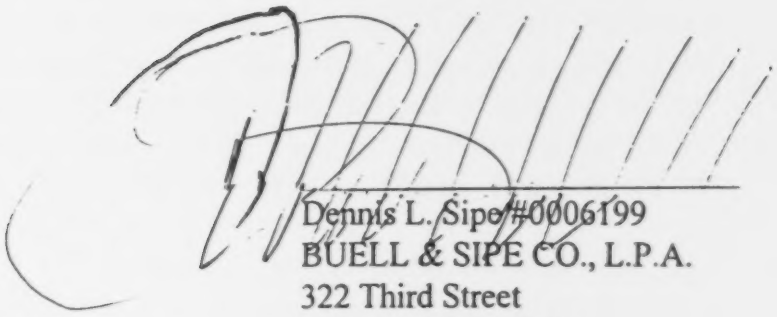
In *Crawford vs. Hatcher*, 804 F.Supp. 834 (D.C. W.Va. 1992), the District Court examined the issue of who would actually be harmed if the West Virginia Savings Statute was held not to apply. The District Court concluded that the statute should not be applied in such a manner as to penalize the plaintiffs for the mistake, inadvertence or neglect of their trial counsel. I+yd at 838. In the present case the refusal of the District Court to apply the Savings Statute punished the Armors for the fault of their trial counsel for not refiling the action in the Federal Courts of Ohio as opposed to the Federal Courts of West Virginia.

The Fourth Circuit Court's conclusions concerning the West Virginia Savings Statute was clearly unreasonable. Consequently the Court erred when it concluded that the instant litigation was barred by the West Virginia Statute of Limitations.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request the Court to grant the writ.

Respectfully submitted,



Dennis L. Sipe #0006199
BUELL & SIPE CO., L.P.A.
322 Third Street
Marietta, OH 45750
Attorney for Petitioners

No. _____

In The
Supreme Court of the United States

October Term 1996

CAROLYN ARMOR;
RICHARD T. ARMOR, JR.,
Petitioners,

v.

MICHELIN TIRE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Dennis L. Sipe
Counsel of Record
BUELL & SIPE COMPANY, L.P.A.
322 Third Street
Marietta, Ohio 45750
(614) 373-3219

Counsel for Petitioners

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered May 13, 1997 ..... App. 1

Order,
United States District Court
for the Southern District of West Virginia
Parkersburg Division
entered December 21, 1995 ..... App. 12

Memorandum Opinion and Order,
United States District Court
for the Southern District of West Virginia
Parkersburg Division
entered April 23, 1996 ..... App. 13

Order,
United States District Court
for the Southern District of West Virginia
Parkersburg Division
entered April 23, 1996 ..... App. 25

Ohio Revised Code § 2305.19 ..... App. 26

West Virginia Code § 55-2-18 ..... App. 27

Federal Rule of Civil Procedure - Rule 41 ..... App. 28

Federal Rule of Civil Procedure - Rule 55 ..... App. 30

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAROLYN ARMOR;
RICHARD T. ARMOR, JR.,
Plaintiffs-Appellants,

v.

MICHELIN TIRE CORPORATION,
Defendant-Appellee,

and

JOHN DOE MANUFACTURER,
Defendant.

No. 96-1724

(CA-95-779-6)

Appeal from the United States District Court
for the Southern District of West Virginia, at Parkersburg.
Charles H. Haden II, Chief District Judge.

Argued: January 29, 1997

Decided: May 13, 1997

Entered: May 13, 1997

Before WILKINSON, Chief Judge, ERVIN, Circuit Judge, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Hilton wrote the opinion, in which Chief Judge Wilkinson and Judge Ervin joined.

COUNSEL

ARGUED: Dennis Lyle Sipe, BUELL & SIPE COMPANY, L.P.A., Marietta, Ohio, for Appellants. John Jerome Polak, KING, ALLEN & GUTHRIE, Charleston, West Virginia, for Appellee. **ON BRIEF:** Michelle M.M. Price, KING, ALLEN, & GUTHRIE, Charleston, West Virginia; James L. McCrystal, Jr., WESTON, HURD, FALLON, PAISLEY & HOWLEY, Cleveland, Ohio, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

HILTON, District Judge:

Appellants Carolyn and Richard Armor appeal from the judgment of the district court denying their motion for default judgment and subsequently granting appellee Michelin Tire Corporation's motion for summary judgment.

I.

On June 3, 1991, plaintiff Carolyn Armor was involved in a motor vehicle accident in Wood County, West Virginia. The apparent cause of the accident was the failure of

the right rear tire on plaintiffs' vehicle and its subsequent wrapping around the rear axle. Carolyn Armor suffered serious injuries as a result of the accident. On June 3, 1993, the Armors filed suit against Michelin in Wood County, West Virginia and on June 2, 1993, in Washington County, Ohio. On June 24, 1994 the West Virginia lawsuit was dismissed due to failure to prosecute. In September 1994, it became apparent to counsel for the Armors that the Armors would not be prepared for trial which was scheduled for September 24, 1994. Plaintiffs had retained an expert who needed additional time and information to complete his investigation concerning the allegedly defective tire. In addition, the injuries that Carolyn Armor sustained as a result of the automobile accident began to increase in severity. The Ohio court was unwilling to grant the Armors a continuance of the trial date. On September 19, 1994, the Ohio court, pursuant to the Armors' motion, dismissed without prejudice the Armors' lawsuit with the proviso that plaintiffs maintained the right to refile the action within one year of the filing of the entry.

On September 15, 1995, the Armors reinstituted litigation in the court below, the United States District Court for the Southern District of West Virginia. In order to give Michelin time to ascertain whether the complaint had been served the parties entered into a stipulation, on October 18, 1995, that Michelin would file an answer by November 5, 1995. Michelin contends that it failed to file an answer by November 5, 1995, because it was never served with the complaint and because counsel for the Armors did not request a waiver of service under Fed. R. Civ. P. 4(d). Following Michelin's failure to answer, the district court clerk's notice to counsel was filed on November 21, 1995. On December 1, 1995, Michelin moved for leave to untimely answer the complaint, and on the same day the Armors' motion for default judgment was filed. Michelin filed its response to the Armors' motion for default judgment on December 14, 1995. The district court denied plaintiffs' motion for default judgment

and granted Michelin's motion for leave to file its answer and affirmative defenses to the complaint. The case went forward until April 23, 1996, when the district court granted Michelin's motion for summary judgment. The Armors appeal the district court's orders denying their motion for default judgment and granting Michelin's motion for summary judgment.

II.

We review the district court's order denying plaintiffs motion for default judgment under an abuse of discretion standard. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp. , 843 F.2d 808 (4th Cir. 1988); Consolidated Masonry & Fireproof, Inc. v. Wagman Constr. Co., 383 F.2d 249 (4th Cir. 1967).

Michelin's opposition to plaintiffs' motion for default judgment can be properly viewed as a motion to set aside an entry of default. Meehan v. Snow, 652 F.2d 274, 276 (2d Cir. 1981), 10 Wright, Miller & Kane, Federal Practice and Procedure,§ 2692, pp. 466-67 (2d ed. 1983). Rule 55(c) of the Federal Rules of Civil Procedure provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Since the present case is one in which a default judgment had not yet been entered, the district court was required to decide plaintiffs' motion for default judgment under the "good cause" standard of Fed. R. Civ. P.55(c) as opposed to the more rigorous standard of Rule 60(b).* The disposition of motions to set aside an entry of default under Rule 55(c) lies largely within the discretion of the district judge and is not lightly to be disturbed by an appellate court. Consolidated Masonry & Fireproof, Inc. v.

---

* Rule 60(b) requires a showing of mistake, inadvertence, surprise, or excusable neglect to set aside a default judgment.

Wagman Constr. Co., 383 F.2d 249, 251 (4th Cir. 1967). The clear policy of the federal rules is to encourage disposition of claims on their merits. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974); Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969).

Under Rule 55(c), the principal factors bearing on the appropriateness of relieving a party of a default are whether setting it aside would prejudice the adversary and whether a meritorious defense is presented. Central Operating Co. v. Utility Workers of America, AFL-CIO, 491 F.2d 245, 252 (4th Cir. 1974). In addition, the district court can consider whether or not the moving party acts with reasonable promptness, see Consolidated Masonry at 251, and whether or not the party has been disadvantaged by the errors or neglect of his attorney, see United States v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982).

In the present case, it is clear that the district court did not abuse its discretion in denying plaintiffs' motion for default judgment. All that is necessary to establish the existence of a meritorious defense is a presentation or proffer of evidence, which, if believed, would permit the court to find for the defaulting party. Moradi at 727 (citing Central Operating Co. v. Utility Workers of America , 491 F.2d 245, 252 n.8 (4th Cir. 1974)). "The underlying concern is . . . whether there is some possibility that the outcome . . . after a full trial will be contrary to the result achieved by the default." Augusta Fiberglass Coatings v. Fodor Contracting, 843 F.2d 808, 812 (4th Cir. 1988) (quoting 10 Wright, Miller & Kane, Federal Practice and Procedure, § 2697, p. 531 (2d ed. 1983)).

Plaintiffs contend that Michelin failed to proffer evidence of its meritorious defenses. Michelin, however, submitted two separate affidavits of its litigation counsel explaining the reasons for default and noting the existence of Michelin's legal and factual defenses to the complaint. Any doubt as to the sufficiency of these affidavits is resolved in Michelin's favor since we cannot say that ultimately Michelin's defenses proved to be without merit. The record is clear that

Michelin was only in default due to the misunderstanding of its Ohio counsel, who believed that the Armors still had to serve the complaint before Michelin was required to answer. Michelin acted promptly when it was apprised of the default, filing its motion for leave to file an answer and affirmative defenses eleven days after it received notice from the clerk's office. Furthermore, the Armors admit that they were not prejudiced, by Michelin's delay in answering the complaint.

III.

We review grants of motions for summary judgment de novo on appeal. Jackson v. Kimel, 992 F.2d 1318, 1322 (4th Cir. 1993); Roe v. Doe, 28 F.3d 404 (4th Cir. 1994). Summary judgment is appropriate when there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c).

In granting Michelin's motion for summary judgment, the district court found that the Armors' claim is barred by the West Virginia statute of limitations and is not saved by the West Virginia savings statute. The Armors' complaint in this case was filed more than four years after the June 3, 1991 accident, forcing the Armors to rely upon West Virginia's savings statute to toll West Virginia's two-year statute of limitations for personal injury actions.

West Virginia recognizes a two-year statute of limitations for damages for personal injuries relating to products liability. W. Va. Code § 55-2-12(b) (1994); see also Barney v. Auvil, 195 W. Va. 733, 738, 466 S.E.2d 801, 806 (1995). Under the West Virginia's savings statute, a timely filed action which is involuntarily dismissed for reasons other than on the merits, may be refiled within one year of the dismissal, even if such refiling is beyond the two-year limitation period. W. Va. Code § 55-2-18 (1994). West Virginia authority is clear, however, that when an action is voluntarily dismissed, even though originally brought within the two-year time frame, it is not saved by the West Virginia

savings statute. Lawrence v. Winifrede Coal Company, 48 W. Va. 139, 35 S.E. 925 (1900); Allen v. Burdette, 89 W. Va. 615, 109 S.E. 739 (1921); McClung v. Tieche, 126 W. Va. 575, 29 S.E.2d 250 (1944); Keener v. Reynolds Transportation Co., 134 W. Va. 712, 61 S.E.2d 629 (1950); Henthorn v. Collins, 146 W. Va. 108, 111, 118 S.E.2d 358 (1961).

The Armors filed two lawsuits against Michelin prior to this action, both of which were dismissed because the Armors elected not to proceed. The first case dismissed was the lawsuit filed by the Armors in the Circuit Court of Wood County, West Virginia. That proceeding was dismissed on June 24, 1994 because the Armors failed to serve the complaint on Michelin. The Armors chose to proceed in Ohio rather than West Virginia.

The second dismissal was by the Ohio state court. Because the Armors were not prepared for trial and the Ohio court would not grant a continuance, the Armors voluntarily dismissed their lawsuit. In accordance with Ohio procedural law, the Ohio court's dismissal order permitted the Armors' action to be refiled within one year. The Ohio savings statute, unlike West Virginia's, would have permitted the Armors to refile their action in an Ohio court within one year even though the first action was voluntarily dismissed. The Ohio procedural law in question, however, can only be applied in Ohio courts. West Virginia law controls the procedural aspects of this case. Saena v. Zenith Optical Co., 135 W. Va. 795, 65 S.E.2d 205 (1951). Statutes of limitation are considered procedural because they are considered as going to the remedy and not the fundamental right itself. Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987), cert. denied, 487 U.S. 1218 (1988) (citing Chase Securities Corp. v. Donaldson, 358 U.S. 304, 314 (1945)); and First United Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989).

The Armors contend that the West Virginia savings statute, West Virginia Code § 55-2-18, should be liberally

interpreted. McClung, 29 S.E.2d at 252. A liberal interpretation of the statute advances the purpose and remedial character of the statute. See Henthorn, 118 S.E.2d at 360. However, the broad construction of the savings statute is appropriate only where "the dismissal was one included within the terms of the statute." Keener, 61 S.E.2d at 632. The statute requires that a dismissal of an action which will save a second action from the effects of a statute of limitations must not be the result of voluntary action on the part of plaintiff. Id. The court in Crawford v. Hatcher, 814 F. Supp. 834, 837 (S.D. W. Va. 1992), noted that in some cases the voluntary nature of the dismissal is difficult to determine. A long line of West Virginia Supreme Court cases require that "voluntary dismissals should be confined to those cases in which the plaintiff has specifically or by implication abandoned his original action." Crawford, 814 F. Supp. at 837. It is clear that the Armors voluntarily moved the Ohio court to dismiss their action pursuant to Ohio R. Civ. P. 41(A). A voluntary dismissal is not within the terms of the statute and, therefore, is not subject to the statute's remedial purpose. Keener, 61 S.E.2d at 631; McClung, 29 S.E.2d at 252.

The Armors cite Ketterman v. Dry Fork Railroad Co., 37 S.E. 683, 684 (W. Va. 1900), for the proposition that the dismissal of their prior lawsuit must have been purely voluntary and attributable solely to their negligence for the savings statute not to be applicable. However, in Ketterman the case was commenced with a defective summons, and subsequently dismissed for that reason. The Ketterman court found that dismissal due to negligence on the part of the clerk, not the plaintiffs, was involuntary. Plaintiffs also cite Litten v. Peer, 197 S.E.2d 322, 323 (W. Va. 1973), in support of their position. In Litten, plaintiff did not appear in court on the day trial was scheduled, and his case was dismissed with prejudice for want of prosecution. The Litten court held that, absent any consideration of the doctrine of resjudicata, the failure of plaintiff to appear on the day of trial did not constitute a

voluntary dismissal or abandonment of the lawsuit and plaintiff's subsequent action would not be barred. The Armors argue that the only difference between Litten and the present case is that in the present case the Armors moved for dismissal prior to the day of trial. However unlike in Litten, there is no doubt that the Armors' action in Ohio state court was dismissed pursuant to their request. The district court properly found that the Armors willfully abandoned their suit, and as a result the suit is not saved by the West Virginia savings statute.

We note that the Armors were not without a forum to litigate their claims following the dismissal of their Ohio state court action. If the Armors had filed this action in either a state or federal court in West Virginia by June 23, 1995, the cause of action would have been saved by West Virginia Code § 55-2-18 because the Wood County, West Virginia action was involuntarily dismissed on June 24, 1994. The West Virginia action was dismissed because of a failure to prosecute, and the Ohio action was abandoned voluntarily because of plaintiffs' need for further expert witness testimony and the need to determine the extent of the continuing deterioration of plaintiff Carolyn Armor's physical condition. Still, at that point, plaintiffs' cause of action could have been resuscitated in one of two ways: 1) as noted above, by filing in a West Virginia Court by June 24, 1995; and 2) by filing in an Ohio Court by September 19, 1995. Because plaintiffs followed neither of these courses of action, their action is barred.

IV.

Five days prior to trial, on September 19, 1994, the Ohio court dismissed the litigation because the Armors were not prepared to proceed at trial. The trial court dismissed the case without prejudice pursuant to Ohio R. Civ. P. 41(A). The Armors contend that the order issued by the Ohio court barred the district court from considering whether their claims were

barred by West Virginia's statute of limitations. The Armors cite Stoner v. New York Life Insurance Co., 311 U.S. 464, 468 (1940), for the proposition that state court determinations are not amenable to being relitigated in the federal courts, where the issues had already been litigated in state court. Plaintiffs have cited decisions from the Third, Seventh and Tenth Circuits for the proposition that a federal court is bound by the prior determination of a state court. Plaintiffs rely once again on Litten v. Peer, where the state court applied the doctrine of res judicata to a federal district court decision dismissing a case with prejudice. In Litten, the state court would not allow refiling of the suit since it was dismissed with prejudice by the federal district court. The Litten court merely applied res judicata to a case that had been dismissed with prejudice and decided on its merits. We find that the cases proffered by the Armors are inapposite to the present case, as the issue of whether the West Virginia's statute of limitations and its savings statute should bar the present claim has never been decided on its merits.

"Dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits, Rule 41 (a) (1), and thus does not have a res judicata effect." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990) (quotations omitted). Res judicata only applies to claims and issues actually litigated between the parties and operates to preclude parties from contesting matters that they have had a full and fair opportunity to litigate. Conley v. Spillers, 171 W. Va. 584 (1983). The decision of the Ohio Court allowed the Armors to refile in Ohio until September 19, 1995, but did not apply to any actions filed in West Virginia. The district court properly found that it was not bound by the dismissal order issued by the Ohio trial court.

V.

For the reasons stated above, the district court's orders denying the Armors' motion for default judgment and granting Michelin's motion for summary judgment are affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

CAROLYN ARMOR and RICHARD T. ARMOR, JR.,

Plaintiffs,

v.

MICHELIN TIRE CORP. and JOHN DOE MANUFACTURER,

Defendants.

Civil Action No. 6:95-0779
Entered: December 21, 1995

ORDER

Pending are Plaintiff's motion for default judgment and Defendant Michelin's motion for leave to file answer and affirmative defenses to Plaintiff's complaint.

In the interest of justice and in the sound exercise of its discretion, the Court concludes the case should be decided on its merits. Accordingly, Plaintiff's motion for default judgment is **DENIED.** The court also **GRANTS** Defendant's motion for leave to file answer and affirmative defenses to plaintiffs' complaint. The Clerk is directed to send a copy of this Order to counsel of record.

*/s/*_____
Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

CAROLYN ARMOR and RICHARD T. ARMOR, JR.,

Plaintiffs,

vs.

MICHELIN TIRE CORP. et al.,

Defendants.

Civil Action No. 6:95-779
Entered: April 23, 1996

MEMORANDUM OPINION AND ORDER

Pending is Defendants' motion for Motion for Summary Judgment. Plaintiffs have responded and Defendants have replied. The Court **GRANTS** the motion.

The standard used to determine whether a motion for summary judgment should be granted or denied has been stated by our Court of appeals as follows:

> A moving party is entitled to summary judgment 'if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.Pro. 56(c). *See* Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir.1979).

> A genuine issue exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Id.* at 255, 106 S.Ct. at 2514. The plaintiff is entitled to have the credibility of all his evidence presumed. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir.1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 447 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. A mere scintilla of evidence supporting the case is insufficient. Id.

Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 115 S.Ct. 67, 68 (1994). At issue in Defendants' Motion for Summary Judgment is whether Plaintiffs' claim is barred by the West Virginia statute of limitations. There are no material facts in dispute and the Court **HOLDS** Defendants are entitled to judgment as a matter of law.

BACKGROUND

Plaintiffs originally filed theit claims in the Circuit Court of Wood County, West Virginia alleging Ms. Armor was injured in an automobile accident that occurred on June 3, 1991 in West Virginia. The action was filed on June 3, 1993. Plaintiffs alleged the accident was caused by a defective tire manufactured by Defendants. That action was dismissed involuntarily but without prejudice for failure to prosecute on June 24, 1994. Plaintiffs also filed an action in the Court of Common Pleas of Washington County, Ohio, on June 2, 1993 against these Defendants, among others, asserting the same claims arising from the same accident at issue in the West Virginia action. The Ohio action was dismissed without prejudice on September 19, 1994. On September 15, 1995 Plaintiffs filed the instant action in this Court asserting the same claims asserted in the previous action. Federal subject matter jurisdiction is based on diversity of citizenship.

Plaintiffs moved for voluntary dismissal without prejudice of the Ohio action on September 19, 1004. Plaintiffs' motion requested the Court to "dismiss the within action without prejudice pursuant to Rule 41 of the Ohio Rules of Civil Procedure. This dismissal is without prejudice and Plaintiffs may file the within action within one year of this dismissal." Defs.' Mem. Supp. Summ. J. Ex. D. On September 19, 1994, the Ohio Court granted the motion stating:

> The Court hereby grants, pursuant to Rule 41 of the Ohio Rules of Civil Procedure, the Plaintiff's Voluntary Dismissal of the within ac action without prejudice. The Plaintiffs maintain the right to refile the within action within one year of the filing of this entry.

Def.s' Mem. Supp. Summ. J. Ex. E. *Rule* 41 (A) (2) of the Ohio Rules of Civil Procedure states:

> (2) By order of the court. Except as provided in subsection (1) an action shall not be dismissed at the plaintiffs instance except upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Plaintiffs contend they are entitled to recommence the action in this Court within one year from the date of dismissal of the Ohio case not only because the language of the Ohio Court's order preserves the claim, but also because it is preserved by the Ohio savings statute, Ohio Rev. Code § 2305.19, which states in pertinent part:

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year of such date.. .

CONFLICT-OF-LAWS

Both parties agree the Ohio savings statute would have saved Plaintiffs' claim had they filed in a court in the State of Ohio by September 19, 1995. Defendants argue, however, and the Court agrees, that because the action was filed in West Virginia rather than Ohio, West Virginia substantive and procedural law controls the action. Because

West Virginia law controls, Plaintiffs' claim is not saved by the Ohio statute.

West Virginia adheres to the conflict-of-laws doctrine of *lex loci dellicti* in automobile cases.[1] Paul v. National Life, 117 W. Va. 427, 433, 352 S.E.2d 550, 556 (1986). Thus, because the accident at issue occurred in West Virginia, West Virginia substantive law controls. More importantly, West Virginia procedural law also controls.

This Court has observed that in diversity cases, federal district courts "must follow the applicable state statute of limitations. In deciding which statue of limitations to apply, this Court must look to the conflicts-of-law rules of the forum state." Harrison v. Piedmont Aviation, Inc., 432 F. Supp. 980, 981 (S.D. W. Va. 1977)(citations omitted). Under West Virginia conflict-of-law rules, although the parties' substantive rights are determined by the doctrine of *lex loci delicti*, West Virginia law controls the procedure. The Supreme Court of Appeals of West Virginia has determined statutes of limitations are procedural "so that the applicable statute of the state where the trial is had is applied and governs." Tice v. E.I. Du Pont De Nemours & Co., 114 W. Va. 24, 28, 106 S.E. 2d 107, 111 (1958). The Court of Appeals for the Fourth Circuit likewise recognizes that a statute of limitations is a "procedural device." First United

---

[1] Although West Virginia still follows the doctrine of *lex loci delicti* when determining which state's substantive tort law applies in automobile accident actions, it has modified its strict adherence to the doctrine in at least one context: "The provisions of a motor vehicle liability policy will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction and the parties." *Lee v. Saliga*, 179 W. Va. 762, 770, 373 S.E.2d 345, 353 (1988). Even if the Court applied a significant relationship test in the instant action, West Virginia law would control because West Virginia is the forum state, the site of the accident, and the Plaintiffs' residence.

Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989). Because West Virginia is the forum state, the Court will apply the West Virginia statute of limitations.[2]

West Virginia Code § 55-2-12(b)[3] provides a two year statute of limitations for personal injury claims, *see, e.g.*, Barney v. Auvil, __ W. Va. __, 446 S.E.2d 801, 806 (1955); Cecil v. Airco, Inc., 187 W. Va. 190, 416 S.E.2d 728, 729 (1992), even when the claims are based on a breach of express or implied warranties. Taylor v. Ford Motor Co., 185 W.Va. 518 519, 408 S.E.2d 270, 271 (1991). Thus, because Plaintiffs' complaint in this action was filed more than four years after the date of the accident,[4] the West Virginia Statute of limitations has run.

Although Plaintiffs' action would have been saved by the Ohio savings statute had it been refiled in an Ohio Court, the West Virginia savings statute, *West Virginia Code* § 55-2-18,[5] does not preserve the action. The Supreme Court of

---

[2] Even if statutes of limitations were considered substantive rather than procedural in nature, the West Virginia statute of limitations would apply because West Virginia adheres to *lex loci delicti* and the auto accident at issue occurred in West Virginia.

[3] *West Virginia Code* § 55-11-12 similarly provides:

> Every personal action for which no limitation is otherwise prescribed shall be brought: . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries. . . .

[4] Plaintiffs do not contend the "discovery rule" of Hichman v. Grover, 178 W. Va. 249, 358 S.E.2d 810 (1987), applies.

[5] *West Virginia Code* § 55-2-18 provides in pertinent part:

> If any action or suit . . . commenced within due time, in the name of or against one or more plaintiffs or

Appeals of West Virginia often has noted the breadth of the savings statute and has instructed that "its purpose being remedial, it should be liberally construed for the purpose of accomplishing the intent thereof." Henthorn v. Collins, 146 W. Va. 108, 111, 118 S.E.2d 358, 360 (1961). The Henthorn Court also pointed out, however, "this Court has repeatedly held that a dismissal of an action which will save a second action from the effects of a statute of limitations must not be the result of voluntary action on the part of plaintiff . . . ." Id., 146 W. Va. at 358, 118 S.E.2d at 109.

The only federal court to consider the definition of "voluntary" under the West Virginia statute noted:

> While the savings statute itself does not directly address this issue, a line of cases has developed in which the West Virginia Supreme Court has held that a voluntary dismissal by plaintiff of his original action takes the case out of the protection of the savings statute. . . . The West Virginia cases span a long time period and there is some

---

defendants, abate as to one of them by the return of no inhabitant, . . . or if, in an action or suit, . . . commenced within due time, judgment or decree (or other and further proceedings) for the plaintiffs should be arrested or reversed on a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action or suit . . . by reason of any other cause which could not be plead in bar of an action or suit, or of the loss or destruction of any the papers or records in a former action or suit which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year of such abatement, dismissal or other cause, or after such arrest or reversal or judgment or decree, or such loss of destruction, but not after. . .

> difficulty in determining which types of dismissal are considered "voluntary" and which are not.

Crawford v. Hatcher, 814 F. Supp. 834 (S.D. W. Va. 1992). Nonetheless, in may instances the voluntary nature of a dismissal is not difficult to determine. Crawford noted the West Virginia Court in Gillispie v. Johnson, 157 W. Va. 904, 209 S.E.2d 143 (1974), held that a plaintiff who did not contest a motion to dismiss his original suit, but responded by filing a new suit in a different court, had dismissed the action voluntarily. Crawford, 804 F.Supp. at 837. The Crawford Court concluded "'voluntary'" dismissals should be confined to those cases in which the plaintiff has specifically or by implication abandoned his original action." Id. That is precisely the situation here; Plaintiffs abandoned the Ohio action in favor of the one before this Court. Further support for the position that the Ohio action was dismissed voluntarily is the Ohio Court's September 19, 1994 order dismissing the action. The order states: "The Court hereby grants, pursuant to Rule 41 of the Ohio Rules of Civil Procedure, the Plaintiff's *Voluntary* dismissal of the action without prejudice." Pls.' Mem. Opp. Summ. J. Ex. A (emphasis added).

The Court concludes Plaintiffs voluntarily dismissed the Ohio action. Because the Complaint in this action was filed more than two years after the accident at issue, Plaintiffs' claims are barred by *West Virginia Code* § 55-2-12(b). Because voluntarily dismissed actions are not saved by *West Virginia Code* § 55-2-18, Defendants are entitled to judgment as a matter of law.[6]

---

[6] If Plaintiffs had filed this action in either a state or federal court in West Virginia by June 23, 1995, the cause of action would have been saved by *West Virginia Code* § 55-2-18 because the Wood County, West Virginia action was involuntarily dismissed on June 24, 1994. The

RES JUDICATA AND FULL FAITH AND CREDIT

Plaintiffs also argue the Court should "give full faith and credit to the res judicata effect of the Ohio Judgment Entry of Dismissal." Pls.' Mem. Opp. Summ. J. at 5. Plaintiffs contend this Court is bound by the Ohio Court's September 19, 1994 Dismissal Order allowing them to refile the action within one year of its entry. Neither the doctrine or res judicata nor full faith and credit is applicable to this action.

According to the Supreme Court, "[d]ismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits, Rule 41 (a)(1), and thus does not have a res judicata effect." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990) (internal quotations omitted). Similarly, the West Virginia Supreme Court pointed out that the doctrine of res judicata requires "the first judgment be rendered on the merits and be a final judgment by a court having competent jurisdiction over the subject matter and the parties." Conley v. Spillers, Syl. Pt. 3, 171 W.Va. 584, 301 S.E.2d 216 (1983). The Ohio Court's dismissal order was not the result of an adjudication on the merits of the case. Its ruling does not have res judicata effect.

Similarly, the Full Faith and Credit Clause of Article IV of the United State Constitution protects a state court's

---

West Virginia action was dismissed because of a failure to prosecute, and the Ohio action was abandoned voluntarily because of Plaintiffs' "need for further expert witness testimony and the need to determine the extent of the continuing deteriorations of Plaintiff Carol Armor's physical condition." Pls. Mem. Opp. Summ. J. at 1. Still, at that point, Plaintiffs' cause of action could have been resuscitated in one of two ways: 1) as noted above, by filing in a West Virginia Court by June 24, 1995; and 2) by filing in an Ohio Court by September 19, 1995. Because Plaintiffs followed neither of these courses of action, their action, unfortunately, is barred.

substantive decisions rendered on the merits from attack in the courts of other states; it does not, however, require one state to apply another's procedural rules. The Full Faith and Credit clause gives "the judicial proceedings of every other state . . . the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state." McElmoyle v. Cohen, 38 U.S. 312, 324 (1839). The Supreme Court "has long and repeatedly held that the Constitution does not bar application of the forum state's statute of limitations to claims that in their substance are and must be governed by the law of a different state." Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988). The Sun Oil Court pointed out:

> The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.

Id. (citations and internal quotation marks omitted). Finally, the Court determined that statutes of limitations are not "sufficiently 'substantive' to require full faith and credit." Id. at 727. Similarly, savings statutes, which are attendant to statutes of limitation, are not sufficiently substantive to require full faith and credit.

With regard to the relationship between the Full Faith and Credit Clause and statutes of limitations, the Supreme Court of Appeals of West Virginia quoted with approval the United States Supreme Court's conclusion in Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-17 (1953):

> Long ago, we held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit. Recently, we referred to . . . the well established principled of conflicts of law that [i]f action is barred by the statute of limitations of the forum, no action may be maintained through action is not barred in the state where the cause of action arose.

Oakley v. Wagner, 189 W. Va. 337, 342, 431 S.E.2d 676, 681 (1993) (citations and internal quotation marks omitted). The Oakley Court went on to quote from 51 Am.Jur.2d *Limitations of Action* § 66 (1970):

> Furthermore, the full faith and credit clause does not compel the forum state to use the period of limitations of a foreign state, and this is true whether the foreign right was known to the common law or arises under a foreign statute which has a period of limitations included in the section creating the right.

Id. It is clear, irrespective of the Full Faith and Credit Clause, a forum state may apply its own limitations and attendant savings statutes although they may conflict with the law of another state with some relation to the litigation. Thus West Virginia's policy of applying its own statute of limitations in West Virginia judicial proceedings when there is a conflict of laws does not violate the Full Faith and Credit Clause.

Because statutes of limitations and savings statutes are procedural, and because federal courts in West Virginia must, as noted above, follow West Virginia procedural rules, the Court must apply the West Virginia statute of limitations.

The Ohio court order, based on Ohio procedural rules, did not and could not determine which rules a court following West Virginia law would apply. Accordingly, the Court **GRANTS** summary judgment for Defendant.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: April 23, 1996

s/_____
Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

CAROLYN ARMOR and RICHARD T. ARMOR, JR.,

Plaintiffs,

v.

MICHELIN TIRE CORP., *et al.*,

Defendants.

Civil Action No. 6:95-0779
Entered: April 23, 1996

JUDGMENT ORDER

In accordance with the Order entered this date, the Court hereby **ORDERS** as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED**; and

2. This case is **DISMISSED** with prejudice from the docket.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: April 23, 1996

*/s/*_____
Charles H. Haden II, Chief Judge

§ 2305.19 Saving in case of reversal.

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. If the defendant is a corporation, foreign or domestic, and whether its charter prescribes the manner and place, or either, of service of process thereon, and it passes into the hands of a receiver before the expiration of such year, then service to be made within the year following such original service or attempt to begin the action may be made upon such receiver or his cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of such agents or officers of the receiver with the person having charge thereof. If such corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no such agent, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on such defendant.

§ 55-2.18. Extension of period for new action after abatement, dismissal, etc., of action commenced within due time.

If any action or suit, including an action for wrongful death, commenced within due time, in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her death or marriage, or if, in an action or suit, including an action for wrongful death, commenced within due time, judgment or decree (or other and further proceedings) for the plaintiffs should be arrested or reversed on a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring new action or suit by reason of such cause having been dismissed for want of security for costs, or by reason of any other cause which could not be plead in bar of an action or suit, or of the loss or destruction of any of the papers or records in a former action or suit which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal or other cause, or after such arrest or reversal of judgment or decree, or such loss or destruction, but not after. The provisions of this section shall not apply to actions brought for the death of any person occurring prior to the first day of July, one thousand nine hundred eighty-two. (Code 1849, c. 149, § 18; Code 1860, c. 149, § 18; Code 1868, c. 104, § 19; 1872-3, c. 112, § 19; 1882, c. 102, § 19; Code 1923, c. 104, § 19; 1985, c. 1.)

FEDERAL RULE OF CIVIL PROCEDURE

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) ***By Plaintiff, By Stipulation.*** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) ***By Order of Court.*** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the

defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action.

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991.]

FEDERAL RULE OF CIVIL PROCEDURE

RULE 55. DEFAULT

(a) Entry.

When a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment.

Judgment by default may be entered as follows:

(1) ***By the Clerk.*** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) ***By the Court.*** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an

investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States.

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief evidence satisfactory to the court.

[Amended March 2, 1987, effective August 1, 1987.]